Supreme Court, U.S.
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In The
Supreme Court of the United States

JIMMY R. COLEMAN,

Petitioner,

vs.

ROBERT STEWART AND THOMAS WRIGHT,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court of Alabama
From Decision of the Court of Civil Appeals of Alabama

PETITION FOR WRIT OF CERTIORARI

COUNSEL FOR PETITIONER:
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QUESTIONS PRESENTED FOR REVIEW

I. Whether the state court engaged in impermissible ex post facto constitutional violation and/or deprivation in applying a State of Alabama statute (6-5-338, 1975 *Code of Alabama*, as amended) to provide qualified immunity as a bar to federal rights of false detention and false imprisonment brought under state constitutional provisions incorporating federal rights?

II. Whether a state court can ignore federally protected principals underlying establishment of probable cause to delay underlying federal claims of false detention and false imprisonment brought under state constitutional provisions incorporating federal rights?

A. Whether the affidavit in aid of the search warrant was obtained through misrepresentation and fraud, thereby violating *Franks v. Delaware* and *Brady v. Maryland* standards?

B. Whether the search warrant and subsequent indictment were procured through tampering and/or fabrication of evidence and tampering with a witness?

C. As to Petitioner, did probable cause exist coupled with exigent circumstances?

D. Whether the search warrant and its affidavit were procured through stale and old information?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jimmy R. Coleman, respectfully petitions for a Writ of Certiorari to review a judgment of the Supreme Court of the State of Alabama.

OPINIONS BELOW

1. Trial Court: Circuit Court of Calhoun County, Alabama

   Memorandum Opinion Order Granting Summary Judgment in Favor of Respondents, dated April 28, 1998 (C-3-423-431).

2. Motion to Vacate, Amend Judgment

   Denied by operation of law ninety (90) days from filing.

3. Notice of Appeal to the Supreme Court of the State of Alabama (C-460-467).

4. State of Alabama Supreme Court Order deflecting case to the State of Alabama Court of Civil Appeals.

5. State of Alabama Court of Civil Appeals Order affirming trial court grant of summary judgment with no opinion (April 30, 1999).

6. Application for Rehearing, Rule 40, *A.R.A.P.*, Rule 39(k) Motion filed May 12, 1999.

7. Order overruling Application for Rehearing; 39(k) Motion denied June 18, 1999.

8. Petition for Writ of Certiorari to State of Alabama Supreme Court filed June 29, 1999.

9. State of Alabama Supreme Court Order denying writ with no opinion dated August 27, 1999.

JURISDICTION

United States Supreme Court Rules 10.1(a), 10.1(b), Rule 12, Rule 13, Rule 14. Date of Entry of Judgment by the State of Alabama Supreme Court, August 27, 1999, 28 U.S.C. §1257

Constitutional provisions - (A) Article 1, Section 9, no bill of attainder or ex post facto law shall be parred; (B) Amendment IV, United States Constitution, the right of the people to be secure in their person, houses, papers, and effects against unreasonable searches, shall not be violazed and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing seized.

STATUTES INVOLVED

Title 6-5-338, 1975 *Code of Alabama*, as amended

STATEMENT OF THE CASE

COMES NOW Jimmy R. Coleman, the Appellant in this case, and submits the following Statement of the Case in support of his appeal:

Jimmy R. Coleman initially filed an action in the United States District Court for the Northern District of Alabama, Eastern Division, being Case Number CV-95-PT-1195-E, which suit was brought against the City of Anniston and the Calhoun County Drug Task Force, and including therein the Sheriff of Calhoun County, Alabama. Said suit did not initially name any of the individual police officers involved in the Calhoun County Drug Task Force. The claims against the City of Anniston and other Defendants included claims made under 42 U.S.C. §1983 for false imprisonment, illegal search and seizure, malicious prosecution, among other claims. The Defendants initially filed summary judgment motions alleging that the statute of limitations had run as to the constitutional claims as a result of the use of October 12, 1992 as the date for tolling of the constitutional limitations periods and the fact that the lawsuit was filed in May of 1995. Limited discovery was performed in that the Petitioner filed a Request for Production and obtained the names of the individual Defendant officers involved in the search of what is known as the Coleman Store Equipment premises, which search is the basis of this appeal. Additionally, a Joint Motion to Continue Discovery based upon the briefing occurring as a result of the summary judgment motions which had been filed as, outside of the request for production, no depositions had been taken in the case and no other discovery had been performed. Additionally, a Motion

to Amend to add the individual officers as Defendants was pending before the United States District Court. The United States District Court granted the Joint Motions to Continue and then turned around and granted summary judgment, not long thereafter holding that the Motion to Amend to add the individual officers was moot (C-Vol. I-122 and C-Vol. III-pp. 442, 455 and 456).

An appeal to the United States Court of Appeals, 11th Circuit, was taken of the grant of the summary judgment by the Petitioner and pending the appeal, the Petitioner filed his Complaint in the Circuit Court of Calhoun County, Alabama, being the subject of this petition, against the Respondents, Robert Stewart and Thomas Wright. The Petitioner alleged in his Complaint that he was wrongfully detained on or about October 12, 1992 when, during the course of a drug raid being performed on the premises known as the Coleman Store Equipment premises, located at 715 Noble Street, Anniston, Alabama, the Petitioner, who was not present, was called down to the premises. The Petitioner was in his wife's car and was forced to be driven to his house from where he had come, to obtain a key to a safety box located in the trunk of his wife's car under the threat of impoundment of his wife's vehicle. The Petitioner was also detained for several hours at the premises after his arrival, which detention and forced travel to his home to obtain the key for the safety box are the bases of his false imprisonment, false detention, illegal search and seizure claims (C-Vol. I-8-13).

Count V of the Petitioner's Complaint, appearing at C-1-14, included a claim for malicious prosecution.

The Petitioner's Complaint was filed on or about January 16, 1996 (C-Vol. I-7). The Respondents, Thomas Wright and Robert Stewart, filed a Motion to Dismiss or, In the Alternative, Motion to Stay Proceeding on or about February 26, 1998, acknowledging the appeal taken in the United States District Court action, as well as that the outcome of the Federal cause of action could have some effect on the State court action (C-Vol. I-17, 18). The Petitioner filed his response, appearing at C-Vol. I-19-21).

The Honorable Samuel H. Monk, II, Circuit Court Judge, by Order dated April 5, 1996, placed the case on the administrative docket (C-Vol. I-22).

In the meantime, the Petitioner's brother, Jerry R. Coleman, filed two (2) actions in the Circuit Court of Calhoun County, Alabama, being Case Numbers CV-96-123 and CV-96-124. Jerry R. Coleman was the owner of the Coleman Store Equipment premises where the search was performed. The Petitioner was an employee of Jerry R. Coleman. Jerry Coleman's cases are the subject of a separate appeal and Petition for Writ of Certiorari to the Alabama Supreme Court which has yet to be ruled on. Notwithstanding, the Respondents filed a Motion to Consolidate Cases and Place same on the Administrative Docket (C-Vol. I-23-26). An Objection to Motion to Consolidate Cases and Place on the Administrative Docket was filed on behalf of Jerry R. Coleman, the owner of the premises and the Petitioner's brother, which appears at C-Vol. I-27-30).

On or about August 20, 1996, the Honorable Samuel H. Monk, Circuit Judge, transferred the Petitioner's case versus

the Respondents off of the administrative docket to the Court's active docket (C-Vol. I-31).

Thomas Wright and Robert Stewart filed their Answer on or about February 10, 1997, which Answer and defenses contained therein appear at C-Vol. I-47-58.

Appearing at C-Vol. I-59 is the Order of the Court requiring the Respondents to produce a transcription of the taped interview with one of the informants, Heather Easterwood. Attached to said Order is the informant's tape. Note to this Honorable Court: The informant's tape was made December 3, 1992, an approximate month and one-half after the date of the search of the Coleman Store Equipment premises, as well as the date the Affidavit in aid of the search warrant was signed by the officer, Robert Stewart, who is an Respondent in this case.

The informant's tape appears at C-Vol. I-63.

The Respondents again filed a Motion for Reconsideration on Consolidation of Cases whereby the Respondents attempted to consolidate the Petitioner's case with his brother Jerry R. Coleman's cases for trial. Said Motion for Consolidation appears at C-Vol. I-84-86. The Petitioner and his brother, Jerry R. Coleman, filed renewed Objections to Motion to Consolidate the Cases, which appear at C-Vol. I-87-90.

Jimmy Coleman filed a Motion to Amend his Complaint, which appears at C-Vol. I-91-116, including Exhibits thereto. The Petitioner was requesting that the Court amend the Complaint which the Petitioner filed, asking to add a Count for declaration of rights wherein the Petitioner requested that the Court declare that the Respondents, Thomas Wright and Rob-

ert Stewart, be judicially or equitably estopped from asserting lack of probable cause in the State court action by reason of the nolle pross of the Petitioner's criminal case occurring on February 14, 1994, which was the date Petitioner's Motion to Dismiss the Indictment and Motions to Suppress, were scheduled for hearing in the State court criminal prosecution (see Case Action Summary Sheet appearing at C-Vol. I-115). The Motion to Amend was also premised on the deposition testimony of Robert Stewart, in which Mr. Stewart testified that the reason he was told by the Assistant District Attorney for Calhoun County, Alabama as to why the cases were nolle prossed, being misrepresentations involved in the obtaining of the initial warrant (C-Vol. I-92-93).

The Respondents, Thomas Wright and Robert Stewart, filed a Motion for Summary Judgment on or about July 11, 1997, which motion appears at C-Vol. I-117-190. On or about July 23, 1997, the Petitioner filed a Motion for En Camera Court Review/Show Cause of Evidence, requesting that the trial court conduct an en camera hearing to ascertain whether evidence in the possession of the Respondents' counsel which was purportedly presented as part of the "Coleman" file, evidenced tampering with physical evidence, as well as tampering of the witness (i.e., the initial December 3, 1992 interview with the informant) as part of this case. The Petitioner further averred in said Motion for En Camera Review that said Polaroid pictures which were attempting to be used against him in his case represented a fabrication of testimony and evidence. Said Motion for En Camera Review appears at C-Vol. I-191-193.

Petitioner's Motion for Summary Judgment, its Exhibits, and Brief and Memorandum of Law in support thereof, appear at C-Vol. I-194 and C-Vol. II-381.

The trial court, the Honorable Samuel H. Monk, II, set the Appellant's Motion for En Camera Review/Show Cause of Evidence for hearing on August 11, 1997, at 1:30 p.m., by Order dated July 28, 1997 (C-Vol. II-382). Petitioner's Response to the Respondents, Robert Stewart and Thomas Wright's Motion for Summary Judgment appears at C-Vol. II-383-384, which Response incorporated the Petitioner's Motion for Summary Judgment and all Exhibits and testimony thereto, as well as his Brief and Memorandum of Law.

By Order issued by the trial court on or about August 11, 1998, the trial court ordered the case to mediation (C-Vol. II-385-386). By further Order of the court dated August 19, 1997, the Honorable Samuel H. Monk, II ordered a consolidation of Petitioner's case and the Jerry R. Coleman cases for discovery (C-Vol. II-387).

Petitioner filed a Motion in Limine which appears at C-Vol. II, 388-393, requesting that certain information be precluded from use against him, which information dealt primarily with the Petitioner's brother's (Jimmy Coleman's) cases. Robert Stewart and Thomas Wright filed their Response to the Plaintiff's Motion for Summary Judgment, which appears at C-Vol. II-394-400 and continued through C-Vol. III-401-404.

Petitioner filed a Request for Production requesting information concerning a Jack Blakemore, who was the husband of one of the alleged informants (who was not named but who was known by Petitioner) and whose deposition was sched-

uled for January 16, 1998, at 1:00 p.m. The Motion to Shorten Time for Production appears at C-Vol. III-408-409. Robert Stewart and Thomas Wright filed their Objections to the Second Request for Production and Motion to Shorten Time for Production, which appears at C-Vol. III, 410-412. On April 28, 1998, the trial judge, the Honorable Samuel H. Monk, II, entered his Order on summary judgment, granting summary judgment in favor of the Respondents, Thomas Wright and Robert Stewart, against the Petitioner in his case, as well as further granting summary judgment in favor of the City of Anniston, David Dethrage, Calhoun County, James Dunn, Wayne Chandler, Larry Amerson, Thomas Wright and Robert Stewart in the Petitioner's brother's case, which was consolidated with the Petitioner's case. The summary judgment Order appears at C-Vol. III, 420-422 and Memorandum Opinion accompanying said Order on summary judgment appearing at C-Vol. III, 423-431.

Petitioner had, on or about April 27, 1998, served a Motion to Compel the information which he had requested concerning the search and seizure performed on the residence of Mr. Jake Blakemore, which was the subject of the Second Request for Production referred to hereinabove. It was the Petitioner's belief that said discovery requested would have led to additional proof with respect to the tampering issues involved in the Petitioner's case. Said Motion to Compel appears at C-Vol. III, 432-434. Said Motion was not noted as filed by the Clerk until April 30, 1998, which was two (2) days after the summary judgment grant.

Petitioner then filed a Motion to Set Aside, Amend or Vacate Judgment; Motion to Reconsider Pursuant to Rule 59(e), *Alabama Rules of Civil Procedure*; Request for Oral Argument and Hearing Pursuant to Rule 59(g), which Motion to Set Aside, etc. appears at C-Vol. III, 435-457.

Honorable Samuel H. Monk, II, trial judge, set said Motion down for hearing on or about August 20, 1998, at 9:00 a.m. by Order dated June 3, 1998 (C-Vol. III-458). The trial judge, Samuel H. Monk, II, by Order dated June 18, 1998, reset the hearing on the Motion to Set Aside, Amend or Vacate, etc. for July 28, 1998, at 9:00 a.m., which Order appears at C-Vol. III, 459. A hearing was conducted but no ruling on the Motion to Set Aside, etc. was made by the trial court within ninety (90) days from the date the Motion to Set Aside, Amend or Vacate Judgment, etc. was filed, which was May 22, 1998, and which Motion was timely filed. Said Motion was thus denied by operation of law.

Therefore, this appeal ensued with the Notice of Appeal being made to the Supreme Court of Alabama appearing at C-Vol. III-460-461; the Docketing Statement appearing at C-Vol. III-462-464; the Letter of Transmittal of Notice of Appeal to the Appellate Clerk by the trial Clerk appearing at C-Vol. III-465; and the Certificate of Completion of the Clerk's Record appearing at C-Vol. III-466, as well as Certificate of Completion of Record on Appeal by the Trial Clerk appearing at C-Vol. III-467, dated October 1, 1998.

The Alabama Court of Civil Appeals denied the appeal by Order affirming the judgment of the trial court issued with no opinion on or about April 30, 1999. The Petitioner filed an

Application for Rehearing under Rule 40, *Alabama Rules of Appellate Procedure*, and Rule 39(k), *A.R.A.P.* Motion on or about May 12, 1999. The Application for Rehearing was overruled by the Alabama Court of Civil Appeals on or about June 18, 1999. The Petitioner filed a Petition for Writ of Certiorari to the State of Alabama on or about June 25, 1999. The Alabama Supreme Court denied the Petition for Writ of Certiorari with no opinion on or about August 27, 1999.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE STATE COURT ENGAGED IN IMPERMISSIBLE EX POST FACTO CONSTITUTIONAL VIOLATION AND/OR DEPRIVATION IN APPLYING A STATE OF ALABAMA STATUTE (6-5-338, 1975 *CODE OF ALABAMA*, AS AMENDED) TO PROVIDE QUALIFIED IMMUNITY AS A BAR TO FEDERAL RIGHTS OF FALSE DETENTION AND FALSE IMPRISONMENT BROUGHT UNDER STATE CONSTITUTIONAL PROVISIONS INCORPORATING FEDERAL RIGHTS?

The trial court's ruling that the Respondents Wright and Stewart enjoyed the defense of qualified immunity as to probable cause under the false detention, false arrest and malicious prosecution claim, pursuant to Title 6-5-338 of the 1975 *Code of Alabama* is erroneous as a matter of law. First, the Act was not passed until 1994, being Act Number 94-640. The Act did not become effective until after February 15, 1994, which is the date

Petitioner's criminal prosecution was nolle prossed and the date on which the malicious prosecution claim accrued. The actions of Robert Stewart and Thomas Wright then occurred prior to the effective date of the Act. The trial court made a retro-active application of Title 6-5-338, id., providing the Respondents with a defense which was not available to them at the time of the acts committed and, therefore, espoused an ex post facto application of Title 6-5-338 against Petitioner.

In addition, the case notes of Title 6-5-338, id., cite *Crouch v. Whatley*, 900 F. Supp. 1567 (M.D. Ala. 1995). Appearing at Page 1571 of the *Crouch* opinion is the following statement of the Court, which clearly shows that said statute could not operate as a bar to the actions committed prior to the effective date of the Act. Appearing at Page 784 thereof on Page 1573 of the *Crouch* opinion language, is the following:

> "Qualified immunity does not protect a state officer, employee or other public official from acts that are willful, malicious, illegal, fraudulent, in bad faith, beyond his authority, or under mistaken interpretation of the law. *Phillips*, 555 So. 2d at 83 and 85; *see also Lumpkin v. Cofield*, 536 So. 2d 62, 65 (Ala. 1988). . . ."

The Court, in *Crouch*, addressed the summary judgment filed by Whatley seeking qualified immunity under the statute. Crouch contended the statute, as in Jimmy Coleman's case, was passed subsequent to the matters complained of by Crouch.

The Court then held, after addressing the statute, the following:

[9, 10] Statutes generally operate prospectively only, in the absence of a clear statement to the contrary by the legislature. *Ex parte Burks*, 487 So. 2d 905, 907 (Ala. 1985). Specifically, the Supreme Court of Alabama has stated:

> In Alabama, retrospective application of a statute is generally not favored, absent an express statutory provision or clear legislative intent that the enactment apply retroactively as well as prospectively. *See Kittrell v. Benjamin*, 396 So. 2d 93, 94 (Ala. 1981) (citing *City of Brewton v. White's Auto Store, Inc.*, 362 So. 2d 226 (Ala. 1978)). Remedial statutes, however, are not within the domain of retrospective laws, and do operate retroactively, absent clear language to the contrary. *Street v. City of Anniston*, 381 So. 2d 26 (Ala. 1980).

Burks, 487 So. 2d at 907 (quoting *Jones v. Casey*, 445 So. 2d 73, 875 (Ala. 1983)). Section 6-5-338 contains no language which suggests that it will curtail claims which accrued before its enactment. Further, there is no asserted legislative intent that the statute so operate. Therefore, the court finds that the statute may operate retroactively only if it is found to be 'remedial.'

[11, 12] In *Jones v. Casey*, the Supreme Court of Alabama reiterated the definition of 'remedial statutes' as those 'which impair no contract or vested right, and do not disturb past

transactions, but preserve and enforce the right and heal defects in existing laws prescribing remedies.' 445 So. 2d at 875 (quoting *Dickson v. Alabama Mach. & Supply Co.*, 18 Ala. App. 164, 89 So. 843, 944, *cert. denied*, 206 Ala. 698, 89 So. 922 (1921); *see also Burks*, 487 So. 2d at 907. Based on the foregoing definition, the court finds that §6-5-338 is not remedial as it clearly impairs a substantial right by encroaching upon Mr. Crouch's vested rights on his state law claims. Therefore, the court finds that §6-5-338 does not apply to the state law claims asserted against Officer Whatley, which accrued at the time of the accident even though the case was filed after the statute became effective. As a result, the court concludes that Officer Whatley is not immune from suit as a municipal law enforcement officer under §6-5-338.

II. WHETHER A STATE COURT CAN IGNORE FEDERALLY PROTECTED PRINCIPALS UNDERLYING ESTABLISHMENT OF PROBABLE CAUSE TO DELAY UNDERLYING FEDERAL CLAIMS OF FALSE DETENTION AND FALSE IMPRISONMENT BROUGHT UNDER STATE CONSTITUTIONAL PROVISIONS INCORPORATING FEDERAL RIGHTS?

A. WHETHER THE AFFIDAVIT IN AID OF THE SEARCH WARRANT WAS OBTAINED THROUGH MISREPRESENTATION AND FRAUD, THEREBY VIOLATING *FRANKS V. DELAWARE* AND *BRADY V. MARYLAND* STANDARDS?

(A) Heather Easterwood Wesley (one of the informants), testified that she never provided the officers with any information with respect to Jimmy Coleman prior to the search warrant. The tape recorded conversation occurring between Robert Stewart and Daniel J. Burnick, Esquire, evidenced that Robert Stewart acknowledged to said Daniel Burnick that they had no information on the Coleman brothers (i.e., Jimmy Coleman, the Petitioner herein) dealing only being heavy users.

Heather Easterwood Wesley further testified that her relationship with Jerry Coleman (Petitioner's brother for whom the search warrant was issued) ceased as of the date of her pregnancy which was approximately fourteen months prior to the date the affidavit for the search warrant was executed, and she would not have known whether Jerry Coleman, Petitioner's brother, was still active or using drugs. Jerry Coleman testified that there was nothing in his office the day that Heather Easterwood Wesley and a girl named Beverly entered in his office, which is the date the affidavit for the search warrant was obtained.

It is apparent, that the District Attorney's Office, more particularly Brian Howell (the prosecuting Assistant District Attorney), was not informed as to the fact that another person present at the time of the search was found to have plastic baggies in his pocket, as reflected by the search warrant inventory notes, which would have tended to negate the guilt of Jimmy Coleman through the other persons possession. The District Attorney's Office was also not aware that three (3) of the drugs for which Jimmy Coleman was charged were pre-

scribed medications of Grady Cobb and that Grady Cobb, as well as his physician, had attempted to obtain these drugs back from the task force after their seizure and prior to the grand jury meeting.

The Petitioner's constitutional rights as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution were violated. In *Franks v. State of Delaware*, 438 U.S. 154, 57 L.Ed.2d 667, 98 S.Ct. 2674 (U.S. S.Ct. 1978), the Court held at page 667 of 57 L.Ed.2d 667 as follows:

(1) Where a defendant made a substantial preliminary showing that a false statement knowingly and intentionally or with reckless disregard for the truth was included by an affiant in his affidavit for a search warrant, and if the alleged false statement was necessary to the finding of probable cause, the Fourth Amendment required that a hearing be held at the defendant's request so that he might challenge the truthfulness of factual statements made in the affidavit; and,

(2) if at such hearing the defendant established by a preponderance of the evidence, the allegation of perjury or reckless disregard, and, with affidavit's false material set to one side, the affidavits remaining content was insufficient to establish probable cause, the search warrant had to be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Strength v. Hubert, 854 F.2d 421 (11th Cir. 1988), stated at page 425 thereof as follows: "...given this duty, Wheeler con-

cluded that a right against capricious prosecutions, i.e., those prosecutions procured by false or misleading information that would cause a prosecutor to believe probable cause existed when it, in fact, did not, was incorporated by the Fourteenth Amendment. 734 F.2d at 260...." *Franks v. Delaware*, supra, the obligations to disclose continue up and unto the probable cause hearing which was on February 14, 1994.

Petitioner submits that this was the case with the nolle pross of his criminal prosecutions premised upon the tape recorded conversation of the Respondent Stewart which contradicted the language of the affidavit for the search warrant; the failure to disclose to the prosecution the presence of drugs or evidence of drugs on another person present at the search, as well as Grady Cobb's medication for which Jimmy Coleman was charged in three (3) counts in his criminal prosecution.

These matters were exculpatory, relevant, tended to negate the guilt of the accused, represented evidence of misrepresentation and concealment, and would have gone directly toward a reasonable probability sufficient to undermine confidence in the outcome of the trial, which was confirmed through the nolle pross of Jimmy Coleman's Circuit Court criminal case. The nolle pross and dismissal of Petitioner's case was premised upon the misrepresentations, of which the District Attorney was made aware, as well as the providing of the Grady Cobb prescriptions to the prosecuting Assistant District Attorney and occurred on the date Jimmy Coleman's Motion to Dismiss the Indictment and Motion to Suppress were scheduled to be heard, and noted as being dismissed on February 15, 1994.

B. WHETHER THE SEARCH WARRANT AND SUBSEQUENT INDICTMENT WAS PROCURED THROUGH TAMPERING AND/OR FABRICATION OF EVIDENCE AND TAMPERING WITH A WITNESS.?

31A C.J.S. §155, states the following:

> Fabrication of Evidence
>
> The fabrication of evidence gives rise to an inference unfavorable to the fabricator.
>
> The fabrication of evidence raises a presumption or, more properly, an inference that the truth, if disclosed, would be detrimental to the interest of the party who has been guilty of such an improper act. Such an inference is created whether the evidence fabricated is documentary or oral, including the exercise of improper influence on witnesses.
>
> As discussed infra §293, an attempt to fabricate evidence may be construed as an admission. However, it has also been held that the fabrication of evidence is not itself evidence of the truth of the facts at issue and does not warrant an inference that the true facts are the opposite of those shown by the fabricated evidence....

In the case of *Gung You v. Nagle*, 34 F. 2d 848, the Court held:

> "Fabrication of testimony is badge of weakness in any case, and when clearly established it justifies a conclusion of fraud as to the entire case. . . ."

The *Gung You*, id. case supports the Appellant's argument that Appellees' entire evidentiary presentation, as well as their defenses, are tainted through the misconduct proved in this case by Petitioner.

The Respondents' attempts to fabricate pictures as being part of the Coleman investigative file and the clear proof presented to the trial court and Appellate Courts of Alabama, with respect to the tampering and fabrication of evidence has been totally disregarded and ignored. A Motion for En Camera Review and Request for Hearing on the tampering of evidence and fabrication issues, was provided no meaningful review, notwithstanding that a prima facie proof had been tendered. It is clear that out of the twenty-four (24) pictures seized, eighteen (18) were still pictures (not Polaroids). The transcription of the informant's interview identified over thirteen (13) polaroids when only six (6) could have been Polaroid pictures. Eighteen (18) photographs were introduced in Jerry Coleman's deposition. The informant testified that the pictures were already in the Respondents' possession prior to the search. It is clear that the polaroids were fabricated and represented tampering in Petitioner's case. Probable cause was thus fabricated for the affidavit for the search warrant, as well as in Petitioner's civil lawsuit.

C. AS TO PETITIONER, DID PROBABLE CAUSE EXIST COUPLED WITH EXIGENT CIRCUMSTANCES?

It is undisputed that Jimmy Coleman was not named in the affidavit in aide of the search warrant. It is undisputed

that he was not at the premises at the commencement of the search. Thomas Wright testified that he was aware of the proposition that a person has a reasonable expectation of privacy in a locker. Thomas Wright testified that the persons under armed guard during the search, would not be able to remove evidence. Thomas Wright further testified that the safe was not going anywhere built into the wall.

The affidavit and search warrant were facially defective as to the Appellant and could not be used for a basis for his criminal prosecution, by reason of the fact that he was not named therein and was not present upon the premises at the time that the search was commenced. Additionally, it cannot be said that Jimmy Coleman was charged under a legitimate warrantless search as there did not exist probable cause coupled with exigent circumstances required to validate a warrantless search of the items or property where Jimmy Coleman could expect a reasonable expectation of privacy. This is notwithstanding that Jimmy Coleman has presented genuine issues of fact that the evidence found was not where Stewart and Wright contended that evidence was found.

In *Ybarra v. Illinois*, 444 U.S. 85, 62 L.Ed.2d 238, 100 S.Ct. 338, reh. den., 44 U.S. 1049, 62 L.Ed.2d 737, 100 S.Ct. 741 (1979), the search of the tavern in that particular case involved a search warrant similar to the one utilized in the matters for which Jimmy Coleman complains. The search warrant was a blanket search for the entire tavern based upon an informant's statements that he had observed ten (10) full packets on the person of a bartender behind the bar at a certain tavern and that he had been advised by the bartender that the latter would have

heroine for sale on a certain date. The search warrant in this case pertains to the premises at 715 Noble Street, Anniston, Alabama, owned by Jerry Coleman, Petitioner's brother, and the search was for the premises, its curtilage and all vehicles.

In *Ybarra v. Illinois*, id., the Court held in Foot Note 2 thereof, the following:

> Regardless of the fact that police possessed a warrant based on probable cause to search the tavern, there was no probable cause to search the patron at the time the warrant was executed, the police having no reason to believe that he had committed, was committing or was about to commit any state or federal offense, and (3) the customer in the tavern was clothed with individualized protection against an unreasonable search or seizure which was separate and distinct from the Fourth and Fourteenth Amendment protection possessed by and the proprietor of the tavern or by the employee, the warrant which provided the officers with authority to search the premises giving them no authority to invade the constitutional protection possessed individually by the tavern customers, and the (4) the initial search of the customer in the form of a pat down was not supported by a reasonable belief that he was armed, was not therefore a permissible exception to the requirement of probable cause, and accordingly could not yield probable cause to support the second, more extensive search, allegedly based on an exigent situation during which the heroine was found.

Simply because the officers in the *Ybarra v. Illinois*, id. case had a search warrant which was based upon probable cause, did not extend that probable cause to the persons not named in the warrant (i.e. in this case, Jimmy Coleman nor any of the employees not specifically named in the Coleman Store Equipment search warrant itself).

In *U.S. v. Speights*, 557 F.2d 362 (3rd Cir. 1977), the court recognized a subjective reasonable expectation of privacy in lockers assigned to police officer and held that evidence obtained from a warrantless search of the officer's locker in question was inadmissible evidence. In *Mancusi v. DeForte*, 392 U.S. 364, 20 L.Ed.2d 1154, 88 S.Ct. 2120 (1968), the United States Supreme Court recognized a reasonable expectation of privacy in a union official in the union official's desk or filing cabinet in his office, even where the office was shared with others working for the union. The Court extended the word "houses" as it appears in the fourth Amendment guaranteeing the right of people to be secure in their "houses" against unreasonable searches and seizures to commercial premises, which was later recognized in *Ybarra*, id.

Jimmy Coleman's case consisted of a search of his desk (to which others had access), and his office safe, wherein he had a reasonable expectation of privacy requiring proper procedure or the necessity of obtaining a separate warrant in order to search the same. The probable cause under the search warrant could not be said to extend to Jimmy Coleman, nor his desk, nor his safe.

As to any argument made by Robert Stewart and Thomas Wright contending that probable cause and exigent circum-

stances justified the search of Jimmy Coleman's desk and safe, counsel for the Appellant is not aware of any case where it can be said that a person not present at premises being searched was capable of removing contents from a safe while premises were secured by multiple members of a drug task force or, similarly, that person not present could enter the premises while it was occupied by multiple members of a drug task force, open the safe and destroy evidence prior to the obtaining of a warrant. Certainly, the Respondents shall not attempt to argue that same person who was not present at the premises would go to the premises during it occupancy by the multiple members of the Drug Task Force and attempt to remove a 1,500 to 1,600 pound safe while under armed guard.

The premises were under the complete control of the Calhoun County Drug Task Force and its members there present. The proper procedure should have been to call and obtain a warrant for the safe which was believed to be Jimmy Coleman's safe where he was not named in the search warrant. Otherwise, Robert Stewart and Thomas Wright failed to meet the criteria of the exception to warrantless searches categorized in the exigent circumstances exception as said exception requires that there not only exist exigent circumstances, but that the exigent circumstances must be coupled with probable cause. Even if one were to assume that probable cause may have existed against the Appellant, one absolutely could not assume that the exigent circumstances existed where the Appellant was not present. The failure of half the equation thus renders the whole defective.

Under *U.S. v. Tobin*, 923 F.2d 1506 (11th Cir. 1991), at Page 511 thereof, the Court held in Key Not 5 as follows:

> Circumstances are not normally considered exigent where the suspects are unaware of police surveillance. *Torres*, 705 F.2d at 1297, *United States v. Cravero*, 545 F.2d 406, 414-15 n. 24 (5th Cir. 1976), cert. denied, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977). This Circuit has held, moreover, that a warrantless search is illegal when police possess probable cause but instead of obtaining a warrant create exigent circumstances. See *United States v. Schedffer*, 436 F.2d 567, 575 (5th Cir.), cert. denied, 409 U.S. 984, 93 S.Ct. 324, 34 L.Ed.2d 248 (1972); See also *United States v. Munoz-Guerra*, 788 F.2d 295, 298 (5th Cir. 1986). . . .

Jimmy Coleman was at home when the search was initiated and, therefore, was not aware that he was under surveillance and was certainly not aware that a search was pending at the time he was called to go to the premises. At page 1510 of the *U.S. v. Tobin* opinion, the Court recognized in Foot Note 2 thereof, the following:

> "The warrantless search of a home is 'presumptively unreasonable.' *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380, 63 L.Ed.2d 639 (1980). A warrantless search is allowed, however, where both probable cause and exigent circumstances exist. *United States v. Burgos*, 720 F.2d 1520, 1525 (11th Cir. 1983)."

The Court then went on to review probable cause and the exigent circumstances, which both had to exist to justify the warrantless search. The court utilized the totality of the circumstances test cited in *United States v. Hurtado*, 779 F.2d. 1467, 1477, (11th Cir. 1985) and then turned its attention to exigent circumstances, stating the following:

> [4] To justify a warrantless search, however, there must also exist exigent circumstances in addition to probable cause. *Burgos*, 720 F.2d at 1525. This Circuit has held that the "presence of contraband without more does not give rise to exigent circumstances." *United States v. Torres*, 705 F.2d 1287, 1297 (11th Cir.), vacated and remanded on other grounds, 718 F.2d 988 (11th Cir. 1983). An exigent situation may arise, however, when there is danger that the evidence will be destroyed or removed. *Burgos*, 720 F.2d at 1526. See also *United State v. Standridge*, 810 F.2d 1034, 1037 (11th Cir.) (listing several factors indicating existence of exigent circumstances), cert. denied, 481 U.S. 1072, 107 S.Ct. 2468, 95 L.Ed.2d 877 (1987). This Court has held that the need to invoke the exigent circumstances exception to the warrant requirement is 'particularly compelling in narcotics cases' because narcotics can be so quickly destroyed.' *United States v. Young*, 909 F.2d 442, 446 (11th Cir. 1990). The test of whether exigent circumstances exist is an objective one. Id. "[T]he appropriate inquiry is whether the facts ...would lead a reasonable experienced agent to believe that evidence might be destroyed before a warrant could be secured." Id., (quoting *United*

States v. Rivera, 825 F.2d 152, 156 (7th Cir.), cert. denied, 484 U.S. 979, 108 S.Ct. 494, 98 L.Ed.2d 492 (1987).

The appropriate inquiry then, according to *U.S. v. Tobin*, id., citing *United States v. Burgos*, id., is "whether the facts...would lead a reasonable, experienced agent to believe that evidence might be destroyed before a warrant could be secured." (Quoting *United States v. Rivera*, infra). Under this scenario, the two-prong test of probable cause, coupled with exigent circumstances, does not exist and the Respondents have failed to substantiate the warrantless search requirements of *United States v. Burgos*, id.

As a result of the failure of Robert Stewart and Thomas Wright to comply with the requirement of probable cause coupled with the exigent circumstances exception to the warrantless search; the warrantless search being presumptively unreasonable, then there is not even arguable probable cause upon which the defense of qualified immunity can be based.

D. WHETHER THE SEARCH WARRANT AND ITS AFFIDAVIT WERE PROCURED THROUGH STALE AND OLD INFORMATION?

In the case of *Dean v. State*, 46 Ala. App. 365, the Court held:

> Search warrant affidavit, which was based on information received by affiant from informant, but which did not show that information was fresh but only

that informant had given reliable information in the last three months, was deficient.

One element in the concept of probable cause is the time of occurrence of the facts relied upon, and an express statement in the affidavit for a search warrant as to the time of the occurrence of those facts relied upon as supporting probable cause is essential to the validity of a search warrant based upon such affidavit. *Horace E. Davis v. State*, 46 Ala. App. 45, 237 So. 2d 635; *Ex Parte State of Ala. ex rel. Atty. Gen., (Re Horace E. Davis, Alias v. State of Ala.)* 237 So. 2d 640; *Rosencranz v. United States*, 356 F. 2d 310 (First Circuit 1966); *SGRO v. United States*, 287 U.S. 206, 53 S. Ct. 138, 77 L. Ed. 260; Annotation, 100 A.L.R. 2d 525; *Poldo v. United States*, 55 F. 2d 866; *Staker v. United States*, 5 F. 2d 312 (Sixth Circuit, 1925); *Bentley v. Commonwealth*, 239 Ky. 122, 38 S.W. 2d 963; *People v. Musk*, 231 Mich. 187, 203 N.W. 865.

A portion of the affidavit used in aid of the search warrant in the *Dean* case, reads as follows:

. . .I have received information from a reliable informant that he knows that illegal drugs and marijuana are being sold and dept in this apartment as he has seen it in there. He has also been to parties where these drugs and marijuana were used. There is one instance where the police were called to this apartment to check on a woman screaming and the officer who investigated reported the woman to be on drugs. My informant has

given me information in the last three months and it has been reliable.

The Court further held in the *Dean* case:

"The trial judge who ruled the evidence admissible did not have the opinion of the Supreme Court in *Davis v. State*, 286 Ala. 117, 237 So. 2d 640. There Merrill, J., said in part:

'Finally, we agree with the Court of Criminal Appeals that the affidavit is deficient because it fails to show that the information received from the informant was fresh as opposed to being remote. No date is stated in the affidavit other than the date it was signed before the judge of the county court.' *Dean v. State*, id."

The testimony of Mrs. Wesley that it had been over 14 months since she had a relationship with Jerry Coleman, Petitioner's brother and owner of the premises, as well as Jerry Coleman's testimony to this effect, proved the staleness of the information upon which Robert Stewart relied in obtaining the search warrant.

Petitioner believed that Heather Easterwood Wesley was the person upon whom the portion of the affidavit attributed to the reliable informant was referring to in Robert Stewart's Affidavit in aid of the search warrant. However, the Affidavit by Mr. Stewart submitted in the Federal Court action, as pointed out previously hereinabove, stated that two (2) reliable informants had provided information, both of whom had been reliable in the past and both of whom had provided in-

formation which had led to arrests, was refuted in the Circuit Court of Calhoun County civil action, where Robert Stewart testified that the reliable informant corroborated the unreliable informant's information (or vice-versa).

In taking this position, the Respondents are basically stating that information was relayed to the reliable informant upon whom Robert Stewart relied in executing his affidavit. The Alabama Court of Criminal Appeals in *Villemez v. State*, 555 So. 2d 342 (Ala. Crim. App. 1989) held:

> "Search warrant affiant's statement as to what informant told him would be stricken from search warrant affidavit where affiant recklessly or intentionally stated that informant 'relayed' information to him when he actually received information from another police officer who had spoken to informant. . . "

The fact of the omission from Robert Stewart's affidavit in aid of the search warrant of the purported corroborated information upon which he was relying, represented a misstatement of the evidence upon which the magistrate was reviewing to ascertain whether probable cause actually existed. The affidavit in aid of the search warrant should be stricken as a result. Without the stricken information attributed to the reliable informant in the affidavit in aid of the search warrant (which information is in doubt and subject to other argument contained herein), there are no probable cause facts remaining in the affidavit to justify the search warrant itself. As a result, the affidavit is insufficient to establish probable cause and the search warrant is void.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.
Respectfully submitted,

JIMMY R. COLEMAN, Pro Se
715 Noble Street
Anniston, AL 36201
(256) 236-5518

Revised - January 27, 2000

(Original Submission - November 22, 1999)

APPENDIX A

STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

OCTOBER TERM, 1998-99

2971400

Jimmy R. Coleman v. Robert Stewart and Thomas Wright, Appeal from Calhoun Circuit Court (CV-96-28).

YATES, Judge

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P.; Ex parte Sonnier, 707 So. 2d 635 (Ala. 1997); Crowne Investments, Inc. v. Bryant, 638 So. 2d 873 (Ala. 1994); Bama Budweiser of Montgomery, Inc. v. Anheuser-Busch, Inc., 611 So. 2d 238 (Ala. 1992); Archie v. Enterprise Hosp. & Nursing Home, 508 So. 2d 693 (Ala. 1987); Eubanks v. Hall, 628 So. 2d 773 (Ala. Civ. App. 1993); and Thomason v. Redd, 565 So. 2d 259 (Ala. Civ. App. 1990).

This case was transferred to this court by the supreme court, pursuant to § 12-2-7(6), Ala. Code 1975.

Robertson, P.J., and Monroe, Crawley, and Thompson, JJ., concur.

John H. Wilkerson, Jr., Clerk of the Court of Civil Appeals of Alabama, do hereby certify the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said court.

Witness my hand this 30th day of April, 1999.

s/ _____

JOHN H. WILKERSON, JR.
Clerk, Court of Civil Appeals
of Alabama

APPENDIX B

June 18, 1999

THE COURT OF CIVIL APPEALS OF ALABAMA

RE: 2971400

Jimmy R. Coleman v. Robert Stewart and Thomas Wright (Appeal from Calhoun County Circuit Court: CV-96-28).

You are hereby notified that the following action was taken in the above cause by the Court of Civil Appeals:
Application for Rehearing Overruled. No opinion written on rehearing. 39(k) Motion Denied.

s/ _____

John H. Wilkerson, Jr., Clerk
Court of Civil Appeals

Court of Civil Appeals
300 Dexter Avenue
Montgomery, AL 36104-3741
(334) 242-4095

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

August 27, 1999

1981567

Ex parte Jimmy R. Coleman. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Jimmy R. Coleman v. Robert Stewart and Thomas Wright) (2971400) (Calhoun Cir.Ct.No.: CV-96-28)

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied. NO OPINION.

BROWN, J. - Hooper, C.J. and Maddox, Houston, Cook, See, Lyons, and Johnstone, concur.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 27th day of Aug., 1999.

s/ _____

ROBERT G. ESDALE, SR., Clerk,

Supreme Court of Alabama ("SB")

APPENDIX D

Section 6-5-338. Peace officers; on or off duty.

(a) Every peace officer, except constables, who is employed or appointed pursuant to the Constitution or statutes of this state, whether appointed or employed as such peace officer by the state or a county or municipality thereof, or by an agency or institution, corporate or otherwise, created pursuant to the Constitution or laws of this state and authorized by the Constitution or laws to appoint or employ police officers or other peace officers, and whose duties prescribed by law, or by the lawful terms of their employment or appointment, include the enforcement of, or the investigation and reporting of violations of, the criminal laws of this state, and who is empowered by the laws of this state to execute warrants, to arrest and to take into custody persons who violate, or who are lawfully charged by warrant, indictment, or other lawful process, with violations of, the criminal laws of this state, shall at all times be deemed to be officers of this state, and as such shall have immunity from tort liability arising out of his or her conduct in performance of any discretionary function within the line and scope of his or her law enforcement duties.

(b) This section is intended to extend immunity only to peace officers and governmental units or agencies authorized to appoint peace officers. No immunity is extended hereby to any private non-governmental person or entity, including any private employer of a peace officer during that officer's off-duty hours.

(c) Every private, non-governmental person or entity who employs a peace officer during that officer's 'off-duty' hours to perform any type of security work or to work while in the uniform of a peace officer shall have in force at least $100,000 of liability insurance, which insurance must indemnify for acts the 'off-duty' peace officer takes within the line and scope of the private employment. The failure to have in force the insurance herein required shall make every individual employer, every general partner of a partnership employer, every member of an unincorporated association employer, and every officer of a corporate employer individually liable for all acts taken by an 'off-duty' peace officer within the line and scope of the private employment. **History**. Acts 1994, No. 96-640.

CASE NOTES

Jurisdiction.
Illustrative cases.

Jurisdiction.

If alleged assault occurred outside the town's police jurisdiction, then the officer and the mayor had no discretion in exercising police authority there. Newton v. Town of Columbia, 695 So. 2d 1213 (Ala. Civ. App. 1997).

Illustrative cases.

Officer was not immune from suit as a municipal law enforcement officer under this section. Crouch v. Whatley, 900 F. Supp. 1567 (M.D. Ala. 1995).